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In the Supreme Court of the United States

OCTOBER TERM, 1997

CAL-ALMOND, INC., CARLSON FARMS, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., AND FRAZIER NUT FARMS, INC.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

BRIAN C. LEIGHTON
701 Pollasky Avenue
Clovis, CA 93612
(209) 297-6190

MICHAEL W. MCCONNELL
Counsel of Record
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 463-2000

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

The government's Brief in Opposition strives to say as little as possible about the substantial First Amendment issue presented in this case, which is fundamentally different from the issue resolved by this Court in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). The question presented is whether a federal marketing order may, consistent with the First Amendment, confer or withhold a credit against a mandatory monetary assessment on the basis of the content of an almond handler's own brand advertising.

In *Wileman Bros.*, the federal marketing order established a mandatory assessment program that had no effect on a commodity handler's own speech. The program was not based on scrutiny of the handler's speech and it offered neither an incentive for speaking in one way nor a disincentive for speaking in another. The creditable advertising program in this case, on the other hand, is a system of rewards and penalties based on the content of the handler's own speech. If the handler's advertisements are approved by the Almond Board, then it receives a credit against its assessment. If the advertisements do not satisfy the Board — which is dominated by petitioners' largest competitor — the handler must pay the full assessment. The program thus not only compels speech but also allows a content-based judgment on an almond handler's speech by a non-neutral decisionmaker.

The Ninth Circuit did not expressly address the constitutionality of this program in light of *Wileman Bros.* — indeed, the court did not even accord petitioners the opportunity to brief the issue — despite a remand from this Court for that purpose. Petitioners ask this Court either to review the First Amendment issue presented here, which will have a broad effect on a number of other pending cases and marketing orders, or to remand the case again to the court of appeals for the full review of the merits originally contemplated by this Court.

1. Stripped of its inaccuracies and irrelevancies, the government's response is premised on the unsupported assertion (Opp. 10) that this case is governed by the Court's decision in *Wileman Bros.*, "because almond handlers have the choice either to contribute to the Almond Board's generic advertising program or to engage in their own creditable advertising under rules promulgated by the Secretary of Agriculture." Based on this "option," the government contends that the creditable advertising program for almonds "involves less compulsion to engage in commercial speech than did the marketing orders declared to be constitutional in *Wileman Bros.*" *Id.* at 11.

But the government never addresses the arguments in the Petition (at 11-19) demonstrating that the reasoning of *Wileman Bros.* compels the conclusion that the creditable advertising program at issue in this case violates the First Amendment. In *Wileman Bros.*, the Court held that marketing orders that "impose [a] restraint on the freedom of any producer to communicate any message to any audience" or that "compel any person to engage in any actual or symbolic speech" should be subjected to heightened First Amendment scrutiny. 117 S. Ct. at 2138 (footnotes omitted).

In this case, the creditable advertising program for almonds imposes a restraint on the freedom of an almond handler to communicate the message of his choice to the public. Some almond advertisements will entitle the handler to a monetary credit and others will force the handler to pay the full assessment. The government's response that an "almond handler remains free to convey any message that it chooses in its advertising" (Opp. 11), simply ignores the constitutional significance of government-imposed financial incentives and disincentives, which constitute "a significant burden on expressive activity." *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 469 (1995); see *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950) ("indirect 'discouragements' undoubtedly have the

same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes").

And the government completely ignores the fact that, unlike the marketing order in *Wileman Bros.*, the creditable advertising program for almonds relies on content-based scrutiny of private speech by a government entity. As noted in the Petition (at 14), a "statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc.* v. *Member of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

Finally, the content-based restrictions on almond advertisements are unconstitutionally administered by a non-neutral decisionmaker — a Board dominated by one company, Blue Diamond, whose interests are diametrically opposed to those of petitioners.[1] App. 165a; see *Air Line Pilots Ass'n* v. *Miller*, 118 S. Ct. 1761 (1998) (First Amendment requires "'an impartial decisionmaker'").

Thus, contrary to the government's assertion (Opp. 11-12), the substantial factual distinctions between the creditable marketing order here and the marketing orders reviewed in *Wileman Bros.* require application in this case of the heightened standard of review articulated by the Court in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*,

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[1] The government's only response to the constitutional infirmity of a biased decisionmaker administering the creditable advertising program is to suggest that an almond handler can always appeal each of the adverse decisions of the Almond Board to the Secretary (Opp. 12-13 n.7). This is hardly an adequate solution. In addition to being impractical (the burden of appealing each adverse determination of the Board would be heavy), it provides no relief from the unconstitutional regulations themselves. Moreover, this Court has never held that the right to appeal from a non-neutral decisionmaker is sufficient to satisfy the First Amendment.

447 U.S. 557 (1980). The government's erroneous attempt to apply reflexively the less exacting standard applied in *Wileman Bros.*, without considering the factual differences of this case, simply illustrates the hazard of attempting to "draw[] bright lines that will clearly cabin commercial speech in a distinct category." *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 419 (1993); see also J. Stevens, *The Freedom of Speech*, 102 YALE L. J. 1293, 1300 (1993) ("First Amendment law has developed into an elaborate mosaic of specific judicial decisions, characteristic of the common law process of case-by-case adjudication").

The Ninth Circuit previously held that the Almond Marketing Order cannot survive scrutiny under *Central Hudson* (Pet. App. 41a-53a). Significantly, the government does not dispute that once the content-based restrictions on creditable advertising are subjected to scrutiny under the *Central Hudson* test, they cannot be upheld.

2. The distinctions between the Almond Marketing Order and the marketing orders in *Wileman Bros.* were substantial enough to cause the Solicitor General to urge the Court to decide *Wileman Bros.* on the merits — but not this case. See Pet. 15-16.

The government, however, now seeks to disavow the thrust of its earlier filings in this case (Opp. 13). The Solicitor General's petition for certiorari stated explicitly that "the Ninth Circuit's decision on the First Amendment issue in this case turned in part on certain aspects of the creditable advertising regulation then in effect" that were not present in *Wileman Bros.* U.S. Pet'n for Cert., *United States Dep't of Agriculture* v. *Cal-Almond, Inc.*, No. 95-1879, at 13 (filed May 1996).

According to the government's petition (at 16), these distinctions affected "the manner in which the First Amendment applies to the particulars of the former creditable advertising regulation in the marketing order for California

almonds." Thus, a decision by the Court on the creditable advertising program at issue in this case, "could leave uncertainty regarding the validity of numerous other statutorily created generic advertising programs that make no provision or different provision for creditable advertising." *Ibid.*

The features of the creditable advertising program that distinguished this case from *Wileman Bros.* when the Secretary was petitioning are the same features that distinguish this case from *Wileman Bros.* now and compel application of the *Central Hudson* standard to invalidate the creditable advertising program.

3. The government's efforts to minimize the importance of the question presented in this case (Opp. 14) are similarly unavailing. The Solieitor General does not dispute that the AMAA authorizes the Secretary to allow credits for individually purchased advertising by handlers of a wide variety of agricultural commodities regulated under the Act, see 7 U.S.C. § 608c(6)(I), and that the Secretary has, accordingly, adopted several creditable advertising regulations, see 7 C.F.R. § 932.45(a)(2), § 982.58(b), § 989.53(b). Thus, contrary to the government's submission (Opp. 14), the question presented is of considerable importance beyond the confines of this case.

The government nonetheless maintains that the case is not certworthy because the unpublished order of the court of appeals does not create any conflict in the circuits (Opp. 14). The fact that the court of appeals disposed of the important question presented in this case without a considered, published opinion (and without briefing on the merits by the parties) only supports our contention that the court did not consider this case properly on remand as directed by this Court.

Moreover, although the Ninth Circuit's order is unpublished, it will have a broad effect on a number of

constitutional challenges to creditable advertising regulations pending in the courts below. Indeed, the government has cited the court of appeals' order in support of its motions to dismiss pending constitutional challenges to creditable advertising programs. In *this* Court, the government treats the Ninth Circuit's decision as having little precedential importance, but in the lower courts the government cites the decision as definitive and conclusive.[2]

All of the cases involving creditable advertising are pending in courts in the Ninth Circuit, because all of the creditable advertising programs involve commodities grown in that region. Therefore, although there can be no circuit conflict on the constitutionality of such programs, there is a grave risk that this important constitutional question will be forever (and erroneously) resolved without any appellate court even receiving briefing and argument on the significance of *Wileman Bros.*

4. The government also relies on the recent amendment to the Almond Marketing Order (Opp. 14-15), arguing without elaboration that "the revised regulation eliminates many of the previous restrictions on the types of advertising for which an almond handler may receive credit."

As we noted in the Petition (at 18 n.11), however, although the restrictions on creditable advertising by

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[2] In the lower courts, the government has taken its position to the extreme of arguing that *Wileman Bros.* itself definitively resolved all First Amendment issues concerning generic advertising programs for agricultural commodities. In fact, the government has sought sanctions against counsel for raising constitutional objections to such programs based upon factual distinctions recognized in the *Wileman Bros.* decision. See U.S. Mem. in Support of Motion for Sanctions, *Gallo Cattle Co.* v. *U.S. Dep't of Agriculture*, No. CV-F-98-5488 (E.D. Cal.) (filed June 12, 1998).

California almond producers have been modified in some respects since this litigation was instituted, see 7 C.F.R. § 981.441 (1998), the changes did not eliminate the serious constitutional defects identified by petitioners in this case. Indeed, the new regulations are indistinguishable from a constitutional perspective. They still offer a credit for a handler's own advertisement if and only if it meets with the approval of the Almond Board.

The fact that the creditable advertising regulation has been modified in some respects should not be a bar to review by this Court. Indeed, if modification of the regulation were a bar, then the constitutionality of the substance of the regulation would never be considered by this Court. The regulation has, as the government itself noted, been the subject of "numerous rulemaking actions to revise and update the creditable advertising and promotion program to address changing circumstances in the industry." 59 Fed. Reg. 35,222, 35,224 (1994). In all, "over twenty-five [Almond] Board recommendations have been made and adopted by the Secretary" concerning the almond marketing program, *id.* at 35,225, since the Almond Marketing Order was adopted in 1970.

In light of the frequency with which the creditable advertising program is amended, and the significant delay involved in litigating any legal challenge to the program — caused largely by the requirement that "administrative proceedings must be exhausted before parties may file suit in court," 59 Fed. Reg. at 35,223 — if each amendment to the program rendered pending legal challenges nonreviewable by this Court, then the important constitutional question presented in this case could never be resolved by this Court.

5. The government concludes with a mocking reference to our request for a remand, as an alternative to plenary review, observing that "[p]etitioners are grasping at straws." Opp. 15. What petitioners, in fact, seek is serious

consideration of the question presented by the court of appeals after full briefing by the parties. Petitioners would have been entitled to file briefs as a matter of course if this case had arisen after *Wileman Bros.*, and they should receive the same consideration now. The government's attitude seems to be that cases involving marketing orders are all alike, and not worthy of a court's attention. They are *not* all alike, and petitioners are entitled to be heard on their First Amendment claim.

In light of this Court's remand order, the substantial constitutional issue presented, and the perfunctory treatment of the question by the Ninth Circuit, a request for serious consideration based on briefing and argument in light of *Wileman Bros.* is a matter of fundamental fairness. It is a sad day when the substance of appellate argument — the right to brief a case — is so lightly dismissed as "grasping at straws."

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition, plenary review should be granted. At a minimum, the Court should vacate the order below and remand with instructions to receive briefing and argument on the relevance of *Wileman Bros.* to this case.

Respectfully submitted.

BRIAN C. LEIGHTON
701 Pollasky Avenue
Clovis, CA 93612
(209) 297-6190

MICHAEL W. MCCONNELL
Counsel of Record
JOHN J. SULLIVAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 463-2000

Counsel for Petitioners

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